



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT 27 2004

Timothy W. Jenkins
Paul L. Knight
O'Connor & Hannan
1666 K Street, N.W.
Suite 500
Washington, D.C. 20008

RE: MUR 5573

Dear Mr. Jenkins and Mr. Knight:

On October 19, 2004, the Federal Election Commission found that there is reason to believe Westar Energy, Inc., ("Westar") violated 2 U.S.C. § 441b(a) of the Federal Election Campaign Act of 1971, as amended ("the Act") and 11 C.F.R. §§ 110.6(b)(2)(ii) and 114.2(f), provisions of the Commission's implementing regulations. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Enclosed is a conciliation agreement that the Commission has approved.

If you are interested in expediting the resolution of this matter by pursuing probable cause conciliation, and if you agree with the provisions of the enclosed agreement, please sign and return the agreement, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Elena Paoli, the attorney assigned to this matter, at (202) 694-1548.

Sincerely,



Bradley A. Smith
Chairman

Enclosures
Factual and Legal Analysis
Procedures
Conciliation Agreement

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Westar Energy, Inc.

MUR: 5573

I. INTRODUCTION

This matter was generated by a sua sponte complaint filed with the Federal Election Commission by Westar Energy, Inc. ("Westar"), alleging potential violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), by Westar and several of its former officers.

II. FACTUAL SUMMARY

A. Background

Westar Energy, Inc., formerly known as Western Resources, Inc., is a Kansas public corporation headquartered in Topeka.¹ It is the largest electricity provider in Kansas, serving more than 600,000 customers and employing more than 2,000 people.

According to information contained in the sua sponte submission ("Submission"), Westar has been politically active since the late 1980s, mostly as an advocate for public utility deregulation. The company's political activities have included direct corporate contributions to state and local candidates (permitted under state law), contributions from Westar's separate segregated fund, most recently known as the Western Resources Political Action Committee

¹ Two utility companies dating to the early 1900s merged to form Western Resources in 1992. In 2002, Western Resources, Inc., changed its name to "Westar Energy."

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("Westar PAC"), to federal candidates, and earmarked contributions from Westar executives to federal candidates, primarily within the Kansas congressional delegation. Notably,

in 1998, employee contributions to the Westar PAC declined significantly and individual earmarked contributions from Westar executives increased in their place.²

B. 2002 Contribution Activity

As reported in Westar's Submission, in late 2001, Congress began to consider a major energy deregulation bill that had significant consequences for Westar. *See Sua Sponte* Submission ("Submission"), at 9. The press reported that an early version of the Energy Bill, proposed by Rep. Joe Barton, would have exempted any subsidiary or affiliate of a utility holding company from Securities and Exchange Commission oversight under the Investment Company Act of 1940 ("ICA").³ Along with a widely accepted effort to repeal the Public Utility Holding Company Act of 1935, the ICA exemption provision would have allowed utility companies to create and own investment companies that would not be subject to any federal regulatory oversight.⁴ Westar was interested in getting this legislation enacted.⁵

²

On March 29, 2001, the PAC notified the Commission that it was terminating effective December 31, 2000. As part of its recent corporate reform efforts, Westar has resurrected a PAC, the Westar Energy Employees Political Action Committee, which filed its Statement of Organization with the Commission on October 3, 2003.

³ *See* Michael Schroeder, *House Power Bill Allows for Host of Exemptions*, Wall St J., Feb 15, 2002, at A4.

⁴ *Id.*

⁵ In the early 1990s, at a time of public utility deregulation, Westar began to diversify the company business by increasing its electric utility holdings as well as acquiring non-regulated businesses unrelated to traditional energy services

Because of strong opposition from several congressional members and the SEC, neither the Senate nor House versions of the Bill contained the industry-wide exemption.⁶

Consequently, according to the Submission, Westar and its outside lobbyist, Richard Bornemann of Virginia-based Governmental Strategies, Inc., devised a political strategy to try to preserve the exemption in the legislation. Submission, at 9. This strategy included the making of contributions to the political committees of key legislators behind the Bill. *See id.*, Attachment 11 (Bornemann memo).

Toward this end, on April 23, 2002, Bornemann submitted a memorandum to Douglass Lawrence, Westar's then-Vice President of Government Affairs, outlining a plan to have Westar make contributions to Rep. W.J. "Billy" Tauzin, Rep. Joe Barton, Rep. Michael G. Oxley, Rep. Richard Burr, Sen. Richard C. Shelby, House Majority Leader Tom DeLay, and to these legislators' designees. *See id.* The memorandum recommended that Westar executives or Westar PAC give \$31,500 to these specific candidates and that Westar make a \$25,000 contribution in nonfederal funds to Rep. DeLay's Texans for a Republican Majority PAC. *Id.* The stated purpose of the proposed contributions was "to develop a significant and positive profile for the Company's federal presence." *Id.*

According to the Submission, shortly thereafter, Lawrence devised a payment schedule for thirteen Westar executives at the Vice President level or above to make individual contributions to the targeted legislators. *See* Submission, at 9-10, and Attachment 12. Based on

⁶ *See, e.g., Testimony Concerning H.R. 3406 and Repeal of the Public Utility Holding Company Act of 1935 and Testimony Concerning The Enron Bankruptcy, the Functioning of Energy Markets and Repeal of the Public Utility Holding Company Act of 1935: Hearings Before the House Comm. on Energy and Commerce, Subcomm. on Energy and Air Quality* (Dec. 13, 2001, and Feb. 13, 2002) (statements of Isaac C. Hunt, Jr., Commissioner, U.S. Securities and Exchange Commission).

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their salaries, Lawrence asked executives to give specific amounts to specific candidates. *Id.* Lawrence made these solicitations by internal office memoranda and email. *Id.* In one such inter-office memorandum dated May 17, 2002, and entitled “Suggested Campaign Contributions,” Lawrence tied the solicitation to the pending Energy Bill and its impact on Westar’s financial restructuring plan. *See* Submission, Attachment 12. The memorandum had three attachments: the first attachment showed the total amount of Westar contributions as outlined by Bornemann and each executive’s pro rata “suggested” share; the second attachment outlined the “first round” of contributions and listed the recipient committees and the amount each executive should contribute; the third attachment spelled out to whom each executive should write a check (or checks) and the specific amount(s). *See id.* Lawrence asked the executives to “Please forward your personal check as soon as possible to my attention.” *Id.* Lawrence sent similar solicitations in July and late-October/early November 2002. *See* Submission, at 10.

In response to these solicitations, each executive made the requested contributions, though some gave more or less than the requested amount. *See id.; see also* Submission, Attachment 15. Chart 1 below sets forth the total amounts requested from and contributed by the executives who participated in the plan. Chart 2 below sets forth the committees that received contributions pursuant to the contribution plan.

CHART 1
Westar Executives' Contribution Schedule
May 31, 2002 – Dec. 19, 2002

NAME	TITLE	TOTAL AMOUNT REQUESTED	TOTAL AMOUNT CONTRIBUTED
David Wittig	President and CEO	\$9,450	\$10,000
Doug Lake	Executive VP Corporate Strategy	\$6,300	\$ 6,300
Doug Sterbenz	Sr. VP Generation & Marketing	\$3,150	\$ 4,200
Paul Geist	Sr. VP and CFO	\$2,677.50	\$ 425
Richard Dixon	Sr. VP Customer Operations	\$1,890	\$ 950
Anita "Jo" Hunt	VP Risk Management	\$1,417.50	\$ 1,700
Douglass Lawrence	VP Government Affairs	\$ 945	\$ 3,300
Leroy Wages	VP, Controller & International Generation	\$ 945	\$ 800
Bruce Akin	VP Business Services	\$ 945	\$ 800
Larry Irick	VP, General Counsel & Corporate Secretary	\$ 945	\$ 850
Peggy Loyd	VP Financial Services	\$ 945	\$ 850
Caroline Williams	VP Customer Care	\$ 945	\$ 1,600
Kelly Harrison	VP Regulatory	\$ 945	\$ 925
Total:		\$31,500	\$32,700

CHART 2
Recipients of Westar Contributions
May 31, 2002 – Dec. 19, 2002

COMMITTEE	TOTAL
The Congressman Joe Barton Committee	\$2,000
Bayou Leader PAC (Tauzin)	\$2,800
Shelley Moore Capito for Congress	\$1,000
Tom DeLay Congressional Committee	\$2,400 ⁸
Graves for Congress	\$1,000
Hayes for Congress	\$1,500
Latham for Congress	\$1,000
Leadership PAC 2004 (Oxley)	\$1,000
Next Century Fund (Burr)	\$1,000
Northup for Congress	\$ 850

⁸ In addition, in May 2002, Westar gave a \$25,000 contribution to Rep. DeLay's Texans for a Republican Majority

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NRCCC	\$1,150
Oxley for Congress	\$1,000
Volunteers for Shimkus	\$1,000
Simmons for Congress	\$1,000
Team Sununu	\$2,000
Texas Freedom Fund (Barton)	\$2,000
Tom Young For Congress	\$10,000
Total:	\$32,700

The Submission states that after the executives submitted the contribution checks, Lawrence collected the contributions and sent them as a bundle to the recipient committees.⁹ In at least some cases, Lawrence forwarded the contribution checks to Bornemann to be hand-delivered to the candidates at fundraising events.¹⁰ See Submission, at 10. Contributions were delivered to the targeted legislators at varying times through late 2002.

C. The Special Report

In September 2002, the U.S. Attorney's Office in Topeka served subpoenas on Westar seeking information about Westar's business practices.

⁹ As of May 2, 2004, Westar reported finding Federal Express receipts documenting 5 shipments of Westar employees' checks to candidate committees. See Submission, at 12; Supplemental Submission, May 2, 2004.

¹⁰ Westar's submission and a Special Report prepared for Westar during an internal investigation, discussed *infra*, p. 9, conflict on this point. The Special Report states that Westar sometimes sent checks directly to the recipient committees, while the submission and accompanying affidavits from Lawrence and his assistant state that the checks always were sent to Bornemann.

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On April 29, 2003, the Special Committee presented the Westar Board of Directors with the results of its investigation in an almost 400-page report ("Special Report").¹³

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The Special Report describes
organized efforts by _____ Lawrence and Lawrence's predecessor, Carl Koupal, between

¹³ See http://media.corporate-ir.net/media_files/nys/wr/reports/custom_page/WestarEnergy.pdf.

2000 and 2002 to make contributions to state and federal candidates who were in positions to benefit Westar. *Id.*, at 341-344. Notably, the Special Report provides greater detail about Westar's pre-2002 contribution activity (when Carl Koupal led the governmental affairs office) than does Westar's sua sponte submission.

According to the Special Report, "management had a practice of soliciting individual officers for recommended political contributions earmarked for particular candidates." *See id.*, at 342. The Special Committee interviewed many of the executives who were asked to make contributions and reviewed relevant documents, including email communications.

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the Special Report noted that "employees indicated in interviews that they could refuse to make contributions to a particular candidate" and "none of the officers we spoke to reported having been told that his or her job would be in jeopardy or that there would be any other form of retribution if he or she did not contribute." *Id.* In conclusion, the Special Committee recommended that Westar hire election counsel to further analyze the events. *Id.*, at 348-349.

In May 2003, Westar posted the Special Report and the accompanying 246 exhibits on Westar's website. Soon thereafter, news stories and editorials began appearing in the media about the Special Report's revelations; most of the articles focused on the 2002 political contribution activity that seemed directly tied to the Congressional assistance Westar reportedly received during negotiations on the Energy Bill.¹⁵ Consequently, many of the legislators who

¹⁵ *See, e.g.*, Thomas B. Edsall and Juliet Eilperin, *Democrats, Group Seek Probe of GOP, Westar*, The Wash Post, June 7, 2003, at A2; Thomas B. Edsall and Juliet Eilperin, *Agency Questions Westar Provision; Executives Called*

received Westar contributions faced allegations by public interest groups and other legislators that they were bribed for their votes and should be investigated for ethics violations.¹⁶ Public attention also fell upon Westar's lobbyist, Richard Bornemann, for devising the contribution plan.¹⁷ Some legislators disgorged their Westar contributions by donating an equivalent dollar amount to charity.¹⁸

D. Prior Contribution Activities

As disclosed in the Special Report, it appears that that the 2002 contribution plan was not an isolated incident and that Westar had a history of coordinated contribution efforts. See Submission, Attachment 3, at 341. The Special Report described one incident in September 2000 where Koupal solicited six executives and requested \$15,500 in political contributions through a payment schedule similar to the one created for the 2002 activity. *Id.*, at 342. An email communication from Koupal dated Sept. 20, 2000, outlined a plan to request contribution checks and "deliver them together," indicating an intent that the contributions be sent as a package to the various candidates. See Submission, Attachment 10.

Real Beneficiaries, The Wash. Post, June 14, 2003, at A4, *Westar Drops Former V.P.-Turned-Lobbyist, Finds Itself in Growing Public Political Scandal*, Electric Utility Week, June 16, 2003, at 1

¹⁶ See, e.g., Charles Babington and Dan Morgan, *Ethics Truce Frays in House*, The Wash. Post, March 17, 2004, at A1; Thomas B. Edsall, *Westar a Saga of Money's Role on Hill; Some Demand Probe as GOP Lawmakers Say No Legislative Deals Were Made*, The Wash. Post, June 23, 2003, at A5. For example, Public Citizen filed a complaint with the Department of Justice's Office of Public Integrity and posted the complaint on its website. In a June 2003 document posted on its website, Public Citizen said that it "requests" the FEC to investigate Westar and the legislators' potential breaches of campaign finance laws. Public Citizen never filed a complaint with the Commission.

¹⁷ See, e.g., Juliet Eilperin, *Westar Lobbyist's Role Detailed; Firm's Representative Attended 2 GOP Lawmakers' Fundraisers*, The Wash. Post, June 10, 2003, at A4; Pete Yost, *Who Solicited Westar Donations - Tauzin and Barton or Utility's Lobbyist?*, Associated Press, June 10, 2003; Pete Yost, *Tauzin, Barton Raised Money for 7 Republicans Who Later Got Donations from Westar*, Associated Press, June 10, 2003.

¹⁸ See, e.g., Thomas B. Edsall, *Westar a Saga of Money's Role on Hill; Some Demand Probe as GOP Lawmakers Say No Legislative Deals Were Made*, The Wash. Post, June 23, 2003, at A5. Research of FEC disclosure report databases revealed no refunds to Westar executives. Research also revealed that Rep. Burr's Next Century Fund and

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According to disclosure reports, it appears that this solicitation resulted in \$13,500 in contributions to four federal candidates. Chart 3 below sets forth the September 2000 contribution effort, and Chart 4 identifies the targeted legislators and the contributions they received.

CHART 3
Westar Executives' Contribution Schedule for Federal Candidates
September 2000 Plan

NAME	TITLE	TOTAL AMOUNT REQUESTED	TOTAL AMOUNT CONTRIBUTED
David Wittig	President and CEO	\$5,500	\$5,500
Doug Lake	Executive VP Corp. Strat.	\$3,000	\$3,000
Thomas Grennan	Executive VP	\$2,000	\$2,000
Carl Koupal	Chief Administrative Officer	\$1,750	\$0
Richard Terrill	General Counsel	\$1,750	\$1,750
Rita Sharpe	Executive VP	\$1,500	\$1,250
Total:		\$15,500	\$13,500

CHART 4
Recipients of Westar Contributions
September 2000 Plan

COMMITTEE	PROPOSED CONTRIBUTION	TOTAL RECEIVED
Dennis Moore for Congress	\$3,500	\$2,750
Moran for Congress	\$1,750	\$1,500
Jim Ryun for Congress	\$5,250	\$6,750
Tiahrt for Congress	\$5,000	\$2,500
Total:	\$15,500	\$13,500

Team Sununu appear to have disgorged \$1,000 Westar contributions to charitable organizations, and Rep. Dennis Moore appears to have disgorged \$1,800 out of \$2,750 he received from Westar.

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Until he left Westar in late

2001, Koupal, like his successor Lawrence, had primary responsibility for soliciting the executives, collecting contribution checks, and sending the checks to recipient committees. *Id.*, at 343.

Other than the September 2000 solicitation, neither the Special Report nor the sua sponte submission cites to specific organized efforts to bundle and forward contribution checks in a manner similar to the 2002 solicitations. FEC disclosure reports disclose a few instances of apparent bundled contributions from Westar executives between June 2001 and February 2002, where two or more Westar executives made contributions at or around the same time to the same committee.²⁰

III. LEGAL ANALYSIS

Koupal and Lawrence, helped select the candidates to whom contributions should be made.

Finally, Westar acknowledges that Lawrence and Koupal

²⁰ Based on disclosure reports, the following additional seemingly bundled contributions occurred: June 15, 2001, \$1,250 from 5 Westar executives to Pat Roberts for Senate; Jan. 9, 2002, \$1,000 from 2 executives to Moran for Kansas; Jan. 10, 2002, \$1,200 from 2 executives to Jim Ryun for Congress; Feb. 5, 2002, \$1,200 from 2 executives to Tiahrt for Congress; and Feb. 23, 2002, \$1,200 from 2 executives to Sam Brownback for U.S. Senate.

acted as conduits or intermediaries by collecting earmarked contribution checks from Westar executives and forwarding them as a package to various recipient committees or to Bornemann who then delivered the checks to the recipient committees.

Corporations are prohibited from acting as conduits for contributions earmarked to candidates or their authorized committees. *See* 11 C.F.R. § 110.6(b)(2)(ii). In addition, the prohibition against corporate contributions embodied in 2 U.S.C. § 441b(a) includes the facilitation of earmarked contributions by a corporation and its officers, directors, or agents. *See* 11 C.F.R. § 114.2(f)(1). Examples of facilitation include directing subordinates to plan, organize, or carry out a fundraising project as part of their work responsibilities, using corporate resources and providing materials for the purpose of transmitting or delivering contributions, such as stamps, envelopes or other similar items, or using coercion to urge individuals to make contributions. 11 C.F.R. §§ 114.2(f)(2)(ii) and 114.2(f)(2)(iv). By collecting and forwarding earmarked contributions to candidates, Westar violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 110.6(b)(2)(ii) and 114.2(f) by acting as a conduit and facilitating the making of contributions.

Despite the undisputed facts, Westar claims that Lawrence and Koupal were acting in a volunteer capacity and not as part of a corporate enterprise, and, thus, their activities were permissible or at the most de minimus violations.²² This claim does not appear to be supported

²² Under Commission regulations, corporate employees may make occasional, isolated or incidental use of corporate facilities for their own individual volunteer activities in connection with a federal election provided the corporation is reimbursed for certain costs incurred by such activity. 11 C.F.R. § 114.9(a).

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by the facts. A corporation can only act through its directors, officers, and agents. *United States v. Wallach*, 935 F.2d 445, 462 (2d Cir. 1991); 1 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 30 (1999 and Supp. 2003). Moreover, corporations may be held liable, both civilly and criminally, for the acts of an employee within the scope of the employment and that benefit the corporate employer. See, e.g., *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7th Cir.1987); 18B Am. Jur. 2d *Corporations* §§ 2131, 2136 (2003). The information available indicates that Lawrence and Koupal solicited, collected and bundled the earmarked contributions from Westar executives using corporate resources and at the request and direction of Westar

There is no indication that Lawrence or Koupal devised the contribution plans on their own or that, absent their employment, they would have solicited contributions from Westar executives.

Thus, Lawrence and Koupal acted in their corporate capacities for the benefit of Westar.

IV. CONCLUSION

Accordingly, there is reason to believe that Westar Energy, Inc., acting through its officers and agents, violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f) by facilitating the making of contributions and violated 11 C.F.R. § 110.6(b)(2)(ii) by acting as a conduit for earmarked contributions to candidates.